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80-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO.

OSWELL M. BRADLEY,
CAROL L. BRADLEY and
LAFAYETTE, INCORPORATED,
Appellants,

V.

J. F. BATTE & SONS OF RICHMOND, INC.
and NED M. GROSSBERG t/a
MEDICAL SCIENCE ASSOCIATION,
and
SAM T. BEALE, Substitute Trustee,
Appellees.

PETITION FOR WRIT OF CERTIORARI

John B. Mann, Esquire
LEVIT AND MANN
Imperial Building, Third Floor
Fifth and Franklin Streets
Richmond, Virginia 23219

QUESTION PRESENTED

Whether the method of foreclosure in this case was illegal under Virginia law and the common law and operated to cause Petitioners to relinquish their interest in certain real estate without due process of law.

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OPINIONS BELOW

The opinion of the Virginia Supreme Court as to which a writ of certiorari is sought is not reported and is set forth in the appendix to this Petition. The Order of the Circuit Court of the City of Richmond, Division I dismissing this law is unreported.

JURISDICTION

The judgment of the Virginia Supreme Court was entered on August 28, 1980. An extension to file this Petition for Writ of Certiorari was granted by The Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, by which Petitioners were granted until January 25, 1981, to file this Petition. This Petition is timely filed by the expiration date of this extension. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether the method of foreclosure in this case was illegal under Virginia law and the common law and operated to cause Petitioners to relinquish their interest in certain real estate without due process of law.

STATEMENT OF THE CASE

Appellants were the owners of certain real estate located in the City of Richmond, located at 2920-24 and 2930 West Broad Street. For the purposes of financing the property in question and other improved real estate formerly owned by them a corporation was formed in the name of Lafayette, Inc.

Loans on the property were made including a junior mortgage securing two notes of $3,500.00 each. Sam T. Beale had been made Substitute Trustee. The property was subject to a number of deeds of trust and judgment liens and the junior mortgage involved in this dispute was a tenth lien on the property.

Foreclosure proceedings were begun by the noteholders of the two notes of $3,500.00 and Sam T. Beal was appointed Substitute Trustee. The advertisement did not mention that the sale would be taken subject to any prior liens which admittedly existed at the time of sale.

The Substitute Trustee, Beale, advertised and sold all of the land and improvements conveyed by the deed of trust, free and clear of all liens and sncumbrances on July 26, 1978, to the defendants, Batte and Grossberg for $184,000.00, although he was aware of the Layman $210,000.00 offer. He had announced at the foreclosure sale before offering the property, "that the property was subject to prior deeds of trust." (Pre-Trial Brief of Sam T. Beale, Substitute Trustee, p.6.)

In his distribution he paid nothing on the lien under which he advertised. (Tr. 125-126.) This is confirmed by his initial report to the Commissioner of Accounts, a copy of which is attached hereto. Neither did he pay any of the subsequent liens consisting of tax liens and docketed judgments. All remain of record (Tr. 146.) None have been released as of the date of the filing of the petition.

The Trustee failed to pay the liens which were prior to the deed of trust upon which he was authorized to act.

Robert Chamberlayne Smith, a member of the Society of Real Estate Appraisers, a real estate broker and appraiser in Richmond, Virginia, since 1935, was pronounced qualified as an appraiser by the Court. (Tr. 62). He appraised the land, buildings and improvements at $390,000.00, after allowing $64,000.00 for painting, maintenance and preventive maintenance. (Tr. 65-66).

The defendants introduced in evidence through John M. Smith, an appraiser of thirty years experience, who testified that the value of the land was $231,000.00, but gave no value to the buildings and improvements. (Tr. 151). Most of the property was then occupied by tenants.

REASON FOR GRANTING THE WRIT

I

The foreclosure sale under Virginia law was improper and operated to force Petitioners to relinquish their real estate without due process of law as served by the Fourteenth Amendment to the Constitution of the United States.

The record in this case clearly demonstrates that the substitute trustee improperly sold Petitioners' interest in certain real estate located in Richmond, Virginia. The refusal of the Virginia Supreme Court to review these facts and review the record of the trial court and its findings cannot be justified in light of the inequity of the holding. This illegal foreclosure sale has serious implications nationwide in regard to the treatment of subordinate liens by the trustees. This practice, as outlined below, is a common practice by trustees and serve to underscore the desirability of a thorough examination of the problem by the courts so that the rights of debtors-in-possession can be protected.

"The trustee is the agent of both debtor and creditor. It is incumbent upon him to act to ward each with perfect fairness and impartiality." Powell v. Adams, supra, at page 174 of Va. Preston v. Johnson, 105 Va. 238, 239, 53 S.E. 1.

Section 55-39 (13) Va. Code requires the trustee to discharge "in the order of their priority," the remaining debts and obligations secured by the deed, ..." The deed here was the tenth lien under which the sale took place.

This is recognized by the Virginia Supreme Court in Kaplan v. Ruffin, 213 Va. 551, 193 S.E.2d 689, at page 692.

Glenn, supra, at page 659, cited from Brooks v. Bennett, 277 Mass. 8, 177 N.E. 685 (1931), as follows:

> "The bids made at such sale must be for that which is to be sold and for that alone; that is to say, the bids must be for the value of the interest in the estate which will pass under the foreclosure deed. If there are prior mortgages, these cannot be sold, and their amount ought not to be included in the bids. The same is true of taxes, assessments and liens, and whatever else may be superior to the mortgage being foreclosed. They must all be excluded from the amount of the bids. The bids in amount are and must be net and not gross."

This is the common law rule adopted by decision and by Code in Virginia as heretofore stated and as will be shown.

The sale having been conducted improperly and attacked promptly by the mortgagor, and no innocent purchaser's rights having intervened, it would appear there is no legal or moral reason to deprive the mortgagors of their rights accorded by law. The sale should be vacated.

The Court states that the general rule is "that the trustee under a second deed of trust must sell subject to prior incumbrances, as he can only sell the equity of redemption in the property." (Underscoring added.) Schmidt & Wilson v. Carneal, 164 Va. at 416, 180 S.E. at 326 is cited as authority.

The substitute trustee has admitted that the grantor did not authorize a departure from this rule or otherwise waive any rights. (Tr. 122).

CONCLUSION

Petitioners respectfully submit that for the reasons herein stated that final judgment of the Circuit Court of the City of Richmond, Virginia, Division I, in this action should be reversed and remanded and that the sale complained of be adjudged improper, or in the alternative, that they have judgment as prayed for.

Respectfully submitted,

OSWELL M. BRADLEY,
CAROL L. BRADLEY, and
LAFAYETTE, INCORPORATED

By _____
Counsel

John B. Mann, Esquire
LEVIT AND MANN
Imperial Building, Third Floor
Fifth and Franklin Streets
Richmond, Virginia 23219

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 14th day of July, 1980.

Oswell M. Bradley, et als., Appellants,

against Record No. 791843
Circuit Court No. C-G-3025-3

J. F. Batte & Sons of Richmond, Inc., et al., Appellees.

From the Circuit Court of the City of Richmond, Division I

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of August, 1980.

Oswell M. Bradley, et al., Appellants,

against Record No. 791843
Circuit Court No. C-G-3025-3

J. F. Batte & Sons of Richmond, Inc., et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 14th day of July, 1980, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO.

LAFAYETTE, INC.,
O. M. BRADLEY,
CAROL BRADLEY, and
BRADLEY BROTHERS CLEANERS
Appellants,

V.

J. F. BATTE & SONS OF RICHMOND, INC.
and NED M. GROSSBERG, t/a
MEDICAL SCIENCE ASSOCIATES
Appellees.

PETITION FOR WRIT OF CERTIORARI

John B. Mann, Esquire
LEVIT AND MANN
Imperial Building, Third Floor
Fifth and Franklin Streets
Richmond, Virginia 23219
Counsel for Appellants.

Petitioners, Oswell M. Bradley, Carol L. Bradley, Lafayette, Inc. and Bradley Brothers Cleaners, pray that a writ of certiorari issue to review the judgment of the Virginia Supreme Court.

QUESTION PRESENTED

Whether or not Petitioners' creditors should be allowed to prosecute their unlawful detainer claim to judgment and have Petitioners post an appeal bond when Petitioners have filed for Reorganization under Chapter 11 of the Bankruptcy Act.

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OPINION BELOW

The opinion of the Virginia Supreme Court as to which a writ of certiorari is sought is unreported, but is attached hereto in the Appendix. The Final Order of the Circuit Court of the City of Richmond, Virginia, Division I, is part of the record.

JURISDICTION

The judgment of the Virginia Supreme Court was entered on July 14, 1980. A Petition for Rehearing was denied on August 28, 1980.

The Court's jurisdiction is invoked under 28 U.S.C. 1257(2).

STATUTORY PROVISION INVOLVED

Virginia Code § 8.01-128

11 U.S.C. 362 (a)

STATEMENT OF THE CASE

Appellants were the owners of the premises known as 2920, 2924, and 2930 West Broad Street, in the City of Richmond, Virginia, which a qualified appraiser testified had a fair value of $390,000.00. The premises were owned by Lafayette, Inc. and occupied by its tenants, the individual appellants, trading as Bradley Brothers Cleaners & Launderers, Security Tire Company and Bass Body Shop.

Appellants were indebted under seven or more deeds of trust against said property

in an aggregate amount of approximately $177,725.00, subject to defenses hereinafter detailed.

The trustee who foreclosed was a substitute trustee on the most junior of the alleged liens, securing two $3,500.00 notes. With full knowledge by the holder of the lien and the trustee of a $210,000.00 offer for the property by an unquestionably solvent purchaser, the holder of the $7,000.00 lien instructed the substitute trustee to proceed with the sale free and clear. It brought $184,500.00. Appellees were the successful bidders.

Appellees then took possession of part of the property, collected rent from the tenants and brought an unlawful detainer action in the Richmond General District Court against appellants. The action was appealed to the Richmond Circuit Court. The appeal bond was $5,500.00.

The Circuit Court increased the penalty of the bond to $10,500.00 by order entered December 27, 1978, thereafter increased it to $20,500.00, and later increased it to $50,000.00. On appellants' motion it was reduced to $20,500.00.

Final judgment entered on October 25, 1979, was in favor of appellees herein for possession of the premises, and the Court awarded judgment of $20,500.00 with interest and the plaintiffs' costs.

Petitioners immediately filed motion to vacate said order upon the grounds that there had been no inquiry of damages, and that the penalty of the bond to suspend,

for appeal, in the penalty of $50,000.00 was exhorbitant and worked a forfeiture, there being no relationship between probable damages which appellees might incur by the appeal and $50,000.00.

The individual appellants have since filed a petition for reorganization and relief under Chapter 11 of the Bankruptcy Code. They are presently operating as Debtors in Possession pursuant to order entered in that proceeding by the United States Bankruptcy Court at Richmond. Appellants are without means to comply with the requirement of a $50,000.00 appeal bond. Pending outcome of their companion appeal they are insolvent.

ARGUMENT

No Damages Were Claimed And There Was No Inquiry Of Damages Upon Which To Base The Award Of Judgment For The Penalty Of The Bond.

The action of unlawful detainer is statutory. Its rights and remedies are specifically defined by statute. The Virginia statute governing this remedy has been amended from time to time, and at the time this action was instituted it read:

> §8.01-128. Verdict and Judgment; damages.---If it appears that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, the verdict

> or judgment shall be for the plaintiff for the premises, or such part thereof as may be found to have been so held or detained. The verdict or judgment shall also be for such damages as the plaintiff may prove to have been sustained by him by reason of such forcible or unlawful entry, or unlawful detention, of such premises, and such rent as he may prove to have been owing to him, provided such damages and rent claimed shall not exceed the jurisdictional amount of the court in which the action is tried. No such verdict or judgment shall bar any separate concurrent or future action for any such damages or rent as may not be so claimed.

REASON FOR GRANTING THE WRIT

The granting of this judgment for unlawful detainer would violate the provisions of 11 U.S.C. § 362 which protects persons filing for relief under Chapter 11 Reorganization under the Bankruptcy Act.

During the pending of this lawsuit and appeal, Petitioners filed for relief under Chapter 11 of the Bankruptcy Act. However, the Respondents have continued to press their claims against the Appeal Bond posted by Appellants. The Virginia courts have not permitted any stay of the proceedings in frustration of the Congressional Intent in permitting debtor

relief under the Bankruptcy Act, 11 U.S.C. § 362(a).

The judgment of the trial court improperly took into consideration elements of damages that were not initially sought by Petitioners.

Ordinarily a plaintiff would be entitled to recover lost rent. The action does not depend on title. It only restores the status quo of the parties and settles nothing as to title or right of possession. Grundy v. Goff, 191 Va. 148, 60 S.E.2d 273. See Shorter v. Shelton, 183 Va. 819, 33 S.E.2d 643.

The Unlawful Detainer Warrant in this case alleged only that the defendants unlawfully withheld possession of the designated premises. No rent or damages were claimed.

It is a fundamental rule of law that evidence of damages not laid in the declaration is incompetent. N & W R. Co. v. Reeves, 97 Va. 284, 33 S.E. 606.

In debt on a bond with collateral condition, the plaintiff cannot recover any damages not demanded in the declaration. Woodson v. Johns, 3 Munf. 230.

The protection of debtor's under 11 U.S.C. § 362 involves greater protection than merely permitting debtor to remain in possession of the property. 11 U.S.C. § 362 "stops all collection efforts, all harrassment and all foreclosure actions." Therefore, it was improper for the Court to permit judgment and collection of the

judgment on the bond that Petitioners were forced to post on appeal.

CONCLUSION

Petitioners respectfully submit that for the reasons herein stated that final judgment of the Circuit Court of the City of Richmond, Virginia, Division I, in this action should be reversed and remanded and that the actions complained of be adjudged improper, or in the alternative, that they have judgment prayed for.

Respectfully submitted,

LAFAYETTE, INC., O. M. BRADLEY, CAROL BRADLEY AND BRADLEY BROTHERS CLEANERS

By _____
Counsel

John B. Mann, Esquire
LEVIT AND MANN
Imperial Building, Third Floor
Fifth and Franklin Streets
Richmond, Virginia 23219
Counsel for Appellants

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 14th day of July, 1980.

Lafayette, Incorporated, et al., Appellants,

against Record No. 800089
Circuit Court No. 79-1816/B-1399

J. F. Batte & Sons of Richmond, Inc., et al., Appellees.

From the Circuit Court of the City of Richmond, Division I

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of August, 1980.

Lafayette, Incorporated, et al., Appellants,

against Record No. 800089
Circuit Court No. 79-1816/B-1399

J. F. Batte & Sons of Richmond, Inc., et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 14th day of July, 1980, and grant a rehearing thereof, the prayer of the said petition is denied.

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